Supreme Court of the United States

OCTOBER TERM, 1976

No 77-9

AMERICAN FIDELITY FIRE INSURANCE COMPANY,

Petitioner,

vs.

SUE KLAU ENTERPRISES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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American Fidelity Fire Insurance Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit which reversed an order of the United States District Court for the District of Puerto Rico.

Opinions Below

The opinion of the Court of Appeals (Appendix A) is reported at 551 F.2d 882 (CA1, 1977). The opinion of the District Court (Appendix B) is not reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered April 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals have jurisdiction of an appeal from an order of the District Court which, in an action or an arbitration award, in which action a counterclaim had been interposed, remanded the case to the arbitrator for a new hearing, dismissed the case "until the arbitration award is rendered" and made no disposition of the counterclaim?

Statutes Involved

The statutes involved are Sections 1291 and 1292 of Title 28 of the United States Code and Rule 54(b) of the Federal Rules of Civil Procedure, which are reproduced as Appendix C.

Statement

Petitioner was the surety on payment and performance bonds issued to respondent in connection with the construction of an apartment house. The construction contract between respondent, the owner of the premises, and Edil Construction, Inc. ("Edil"), the contractor, was incorporated by reference in the bonds. Edil abandoned the work before completion and respondent asserted claims against petitioner.

The construction contract provided that disputes should be determined in the first instance by the architect and that his determination should be final unless within thirty days after receipt of such determination either party sought a new arbitration under the auspices of the American Arbitration Association.

The architect made a purported determination in favor of respondent. No further arbitration was sought.

Respondent brought an action in the United States District Court for the District of Puerto Rico for an order confirming the architect's award and for judgment against petitioner for the amount of such award, the architect's fees and attorneys' fees. Jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332.

Petitioner filed an answer denying the validity of the architect's determination and denying that petitioner ever participated in an arbitration proceeding. It also pleaded a counterclaim alleging that it had made payments of $40,000 under its payment bond in reliance on representations of the architect that the work was 98% completed and that approximately that amount remained on deposit as retainages whereas in fact respondent spent said sum for work not contemplated by the construction contract.

Both parties moved for summary judgment, and both motions were denied (A19). The Chief Judge of the District Court held that the architect had not been aware he was acting as arbitrator and that this was sufficient ground "to remand this case so that a new hearing be held in accordance with the provisions of the contract . . ." (*id.*) Chief Judge Toledo further stated:

> "This case shall be dismissed until the arbitration award is rendered. Once the arbitration award is rendered the parties may resort to this Court for any further remedies they may deem necessary." (A19-20)

Nothing was said in the District Court's opinion about the counterclaim except for one paragraph summarizing it and respondent's reply thereto (A13). No disposition was made of the counterclaim. No certificate was executed under Rule 54(b) of the Federal Rules of Civil Procedure, nor was an order made under 28 U.S.C. § 1292(b).

On appeal by respondent, the Court of Appeals reversed, holding that the architect had understood the duties im-

posed upon him,[1] and directing the entry of summary judgment for respondent on the architect's award (A8, A10). Again, nothing was said about the counterclaim.

Reasons for Granting the Writ

The acceptance by the Court of Appeals of the appeal herein, of which it had no jurisdiction (a) since it was an appeal from a non-final order, without the procedure prescribed by 28 U.S.C. § 1292(b), and (b) since the order neither disposed of petitioner's counterclaim nor contained the certificate prescribed by Rule 54(b) of the Federal Rules of Civil Procedure, (1) so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision and (2) is in conflict with numerous decisions of Courts of Appeals of other circuits dismissing similar appeals.

I

The Question of the Jurisdiction of the Court of Appeals is Properly Raised

It is elementary that, if there is any doubt as to jurisdiction, it is the duty of each federal court to consider the question of its own jurisdiction and the jurisdiction of lower courts, even though no party has raised the question.

> *Liberty Mutual Insurance Company* v. *Wetzel,* 424 U.S. 737, 740 (1976);
> *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan,* 111 U.S. 379, 382 (1884);
> *Capron* v. *Van Noorden,* 2 Cranch 126, 127 (1804).

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[1] The Court also pointed to petitioner's failure to seek arbitration before the American Arbitration Association within the time prescribed after the architect's award. Petitioner submits that its failure to exercise that option does not require the courts to grant judgment on an improper award.

Therefore, the Court of Appeals should have, *sua sponte,* considered its jurisdiction of the appeal and, for the reasons hereinafter stated, dismissed the appeal and this Court may now consider the question even after the Court of Appeals has decided the merits. In each of the cited cases there had been an adjudication on the merits in a lower court before this Court reversed and directed dismissal by the lower court for want of jurisdiction.

II

The Decision of the District Court was Not Final

It is apparent from reading the decision of the District Court that it was not a "final decision" within the meaning of 28 U.S.C. § 1291.

The classic definition of a "final decision" for purposes of appealability is found in *Catlin* v. *United States,* 324 U.S. 229, 233 (1945), where it was said:

> "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."

When Chief Judge Toledo said that "This case shall be dismissed until the arbitration award is rendered" (A19-20) he obviously meant that it would not be "dismissed" after the new award was made. What he really meant was that judicial proceedings were suspended until the award was rendered. He made that clear by adding: "Once the arbitration award is rendered the parties may resort to this Court for any further remedies they (may) deem necessary" (A20). Clearly, he was not telling the parties they could sue again. Rather, he was telling them that they could apply in the pending (no longer "dismissed") action for such relief as confirmation or disaffirmance of the new award or an adjudication of the issues raised by the counterclaim if such issues were not disposed of by the new award.

In effect, what Chief Judge Toledo did was to set aside the first award, to remand the matter to the architect for a new arbitration hearing and to preserve jurisdiction of any judicial proceedings concerning the second award. Such a decision is not a "final" one within the foregoing definition.

A case very similar to the instant one is *Clark* v. *Kraftco Corporation,* 447 F.2d 933 (CA2, 1971). There the parties had agreed that defendant would make a payment to be fixed by a consultant. In an action for the amount fixed by the consultant, the District Judge set aside the consultant's findings and remanded the matter to him for redetermination. The Court of Appeals dismissed an appeal from the remand order.

Among other cases supporting the view that orders remanding for further hearings are not final are:

Bachowski v. *Usery,* 545 F.2d 363, 372-373 (CA3, 1976);
Fugate v. *Morton,* 510 F.2d 307 (CA 9, 1975), cert. den. *sub. nom. Fugate* v. *Hathaway,* 422 U.S. 1045 (1975);
Barfield v. *Weinberger,* 485 F.2d 696, 698 (CA5, 1973);
Dalto v. *Richardson,* 434 F.2d 1018, 1019 (CA2, 1970), cert. den. 401 U.S. 979 (1971);
United Transportation Union v. *Illinois Central Railway Co.,* 433 F.2d 566, 568 (CA7, 1970), cert. den. 402 U.S. 915 (1971);
Transportation-Communication Division v. *St. Louis-San Francisco Railway Company,* 419 F.2d 933, 935 (CA8, 1969), cert. den. 400 U.S. 818 (1970);
Bohms v. *Gardner,* 381 F.2d 283, 285 (CA8, 1967, Blackmun, J), cert. den. 390 U.S. 964 (1968);
Bass v. *Olson,* 327 F.2d 662, 663 (CA9, 1964);
Petersen v. *Sampsell,* 170 F.2d 555, 556 (CA9, 1948).

The requirement of finality as a condition of appealability has existed since the first Judiciary Act of 1789 and is a fundamental principle of federal procedure. *Cobbledick* v. *United States,* 309 U.S. 323, 324-325 (1940); 9 Moore's *Federal Practice* (1970), ¶¶ 110.06, 110.07. Among its purposes are the improvement of judicial administration, *Cobbledick* v. *United States, supra,* 309 U.S. at 325, and the avoidance of delay, *Catlin* v. *United States, supra,* 324 U.S. at 234.

Both these considerations are applicable to the instant case. It is well known that the volume of business in the appellate federal courts has recently grown alarmingly. Strict adherence to the finality rule would serve to reduce the case-load. Although the instant case has been decided on the merits by the Court of Appeals, vacation of the judgment of the Court of Appeals with directions to dismiss the appeal, as was done last year in *Liberty Mutual Insurance Company* v. *Wetzel, supra,* 424 U.S. at 746, see also, *United States* v. *Florian,* 312 U.S. 656 (1941), would serve as a warning that the limitations of jurisdiction must be observed. Furthermore, respondent's action in appealing Chief Judge Toledo's order rather than proceeding to a new arbitration has resulted in great delay. The District Court order was entered January 29, 1976. The United States Court of Appeals for the First Circuit sits in Puerto Rico, where Puerto Rican cases are normally heard, only in February (Rule 1 of Rules of that Court). Accordingly, the appeal herein was not heard until February 8, 1977. By that time, a new arbitration hearing could have been had and any judicial proceedings thereafter needed, including disposition of the counterclaim, could have resulted in a final appealable judgment.

There is nothing inequitable about the relief petitioner seeks. The result would merely be a new arbitration hearing before the architect with both parties and the architect fully aware of what was transpiring. Delay is attributable to respondent's having appealed a non-appealable order.

III

Exceptions to the Finality Rule Do Not Apply

While there are exceptions to the final decision rule, none of them is applicable to this case.

There was no injunction[2] or receivership granted or denied and this is not an admiralty or patent case, so 28 U.S.C. § 1292(a) has no bearing. The procedure prescribed by 28 U.S.C. 1292(b) for review of interlocutory orders by permission was not followed, so that provision is inapplicable.

Other exceptions manifestly irrelevant to the instant case are the appealability of orders directing the immediate delivery of tangible property, *Forgay* v. *Conrad,* 6 How. 201 (1848), and of orders involving some vital matter, collateral to and separable from the issues in the action itself, *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Finally, there is *Gillespie* v. *United States Steel Corporation,* 379 U.S. 148 (1964), in which it was held that, where appealability is a close question, in "marginal cases coming within what might be called the 'twilight zone' of finality" (379 U.S. at 152), a practical rather than a technical approach should be adopted. We respectfully submit that there is nothing close or marginal about the nonappealability of the order herein. Furthermore, it has been held that the doctrine of Gillespie "should be exercised sparingly", *Clark* v. *Kraftco Corporation, supra,* at 936,

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[2] It cannot be successsfully contended that the order was an injunction since it stayed court proceedings pending arbitration. The complaint sought solely the enforcement of the first award made by the architect. The order held that award invalid. In the face of that determination, no further proceedings could be had on the complaint. So far as the order stayed proceedings on the counterclaim, respondent was not aggrieved thereby and therefore, of course, could not appeal. *Lewis* v. *United States,* 216 U.S. 611, 612 (1910); *Gunn* v. *University Committee to End the War in Viet Nam,* 399 U.S. 383, 390, ftn. 5 (1970).

and in fact the doctrine has fallen into "dismal limbo", *Bachowski* v. *Usery, supra,* 545 F.2d at 370, quoting Wright, Miller & Cooper, *Federal Practice & Procedure* (1976), § 3913, p. 535.

IV

The Existence of the Counterclaim Bars Appealability

Even if, despite what has been said above, it should be held that the decision of the District Court herein was final in its disposition of the complaint, it still would not be appealable since it neither disposed of the counterclaim nor had the certificate prescribed by Rule 54(b) of the Federal Rules of Civil Procedure.

There can be no doubt that the decision of Chief Judge Toledo did not dispose of the counterclaim. As noted above, except for one paragraph summarizing the counterclaim and the reply thereto, his opinion contains not one word about the counterclaim. Furthermore, Chief Judge Toledo denied unconditionally respondent's motion for summary judgment (A19). That motion specifically requested both judgment for the relief demanded in the complaint and judgment for respondent on the counterclaim. The denial of that motion obviously left the counterclaim pending.

Rule 54(b) provides that a judgment disposing of less than all claims and counterclaims is not final unless it contains a determination that there is no just reason for delay.

It has been repeatedly held that where there is no certificate under Rule 54(b), an order leaving a counterclaim unadjudicated is not final and that an appeal therefrom must be dismissed.

Johnson v. *McDole,* 526 F.2d 710, 711 (CA5, 1976);
TMA Fund, Inc. v. *Biever,* 520 F.2d 639, 641-642 (CA3, 1975);

Turtle v. *Institute for Resource Management, Inc.*, 475 F.2d 925, 926 (C.A.D.C., 1973);
Oak Construction Company v. *Huron Cement Company*, 475 F.2d 1220, 1221 (CA6, 1973);
Illinois Tool Works, Inc. v. *Brunsing*, 378 F.2d 234, 235-6 (CA9, 1967).

Conclusion

This petition for certiorari should be granted, the judgment of the Court of Appeals should be vacated and remanded with instructions to dismiss respondent's appeal.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals.

Sue Klau Enterprises, Inc.,
Plaintiff-Appellant,

v.

American Fidelity Fire Insurance Company,
Defendant-Appellee.

No. 76-1143.

United States Court of Appeals,
First Circuit.

Heard Feb. 8, 1977.
Decided April 6, 1977.

Eric A. Tulla, Hato Rey, P. R., with whom O'Neill & Borges, Hato Rey, P. R., was on brief, for plaintiff-appellant.

Victor R. Gonzalez-Mangual, Hato Rey, P. R., with whom Rua, Merdaco & Gonzalez, Hato Rey, P. R.,, was on brief, for defendant-appellee.

Before COFFIN, Chief Judge, VAN OOSTERHOUT*, Senior Circuit Judge, and CAMPBELL, Circuit Judge.

VAN OOSTERHOUT, Senior Circuit Judge.

This is an appeal by plaintiff Sue Klau Enterprises, Inc. from a judgment dismissing its complaint for enforcement of an award made by architect Carlos de la Uz Arenal pursuant to the provisions of a building construction contract

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* Of the Eighth Circuit, sitting by designation.

against defendant American Fidelity Fire Insurance Company. Jurisdiction in the trial court, based on diversity of citizenship and the jurisdictional amount under 28 U.S.C. § 1332, is established.

A rather extensive statement of the factual and legal background appears to be desirable. Edil Construction, Inc., (Edil) entered into a contract to construct an apartment building for plaintiff in Santurce, Puerto Rico. The contract is based on American Institute of Architects Standard Form A-201.

Defendant in its brief admits that it issued to plaintiff material, labor and performance bonds which are in full force and effect and which incorporate the construction contract by reference, and that such bonds obligate it for the faithful performance by Edil of its obligations under the building contract.

Defendant also admits that Edil defaulted in the performance of the contract, that plaintiff elected to complete the project pursuant to paragraph 7.6.1 of the contract, and that plaintiff by letters of April 4, 1973, so notified both Edil and defendant bonding company.

Plaintiff completed the building project and on July 25, 1973, sent a letter to the bonding company containing an itemized claim of damages due it by reason of Edil's default and demanding payment under the contract and bonds for its completion expenditures and for delay in construction caused by Edil's default. Defendant admits that it has refused to make payment.

By letter dated December 11, 1973, to architect de la Uz, plaintiff requested determination by the architect that the amounts expended by the plaintiff as itemized in its July 25 letter for the completion of the building were due under the contract and defendant's bonds. Said letter requested the architect's decision on the amount due by reason of the contractor's default, pursuant to paragraphs 2.2.6 *et seq.*

of the contract which provide in substance that claims and disputes arising under the contract shall be initially referred to the architect for decision which shall be made in writing.

The architect sent to defendant a copy of plaintiff's letter requesting the architect's determination of the amount due under the contract and a letter advising that a meeting would be held at 9:00 a.m. on February 22, 1974, at a place specified, for the purpose of making the determination requested. Such letter concluded by saying: "It is my intention to give an impartial opinion on this matter, for which reason you will appreciate how important this meeting will be." Defendant admits the receipt of such letters on February 15, 1974.

The architect, by deposition, testified that a number of meetings were held with the interested parties and that the defendant was represented at several such meetings. On cross examination he testified:

> Q. Did you call the parties and then give them a chance to refute the evidence that was there?
>
> A. Yes, I would say so, I called a meeting, and after several postponements, I remember now, we finally got together, and this letter was reviewed in this meeting, as I see it I gave a chance to everybody to talk about the letter and refute it or do whatever had to be done on this letter. That's my opinion.
>
> Q. Do you know what an arbiter is? What is your opinion of what an arbiter is?
>
> A. I think it is a person who would act as a judge would in a matter in dispute between two parties.
>
> Q. Do you think it's important that the parties know that they are actually in arbitration proceedings?
>
> A. Of course I would say that.

The letter referred to is plaintiff's demand letter heretofore referred to.

Appendix A.

The architect by letter dated April 10, 1974, supplemented by letter dated August 13, 1974, allowed many of plaintiff's claims but rejected some of them and awarded plaintiff $67,516.06. The August 13 letter stated: "This decision is rendered pursuant to the construction agreement and is final but subject to appeal."

Part 7.10 of the contract contains provisions for additional arbitration. Paragraph 7.10.1 provides: "All claims [with certain exceptions not here revelant] shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining."

Paragraph 7.10.2 in pertinent part reads:

> Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits specified in Subparagraphs 2.2.10 and 2.2.11 where applicable, . . ."

Paragraph 2.2.11 provides in turn:

> If a decision of the Architect is made in writing and states that it is final but subject to appeal, no demand for arbitration of a claim . . . covered by such decision may be made later than thirty days after the date on which the party making the demand received the decision. The failure to demand arbitration within said thirty days' period will result in the Architect's decision becoming final and binding upon the Owner and the Contractor.

No notice of demand for arbitration was given by the defendant within thirty days from the architect's final decision as required by paragraph 2.2.11. By letter dated September 17, 1974, plaintiff demanded payment of $67,516.06 determined due by the architect. No payment was made. Plaintiff then commenced this action to enforce the architect's award.

Appendix A.

Defendant by answer made admissions, as set out in the statement of facts, supra, and generally denied the allegations asserting its liability. By way of affirmative defense, defendant pleaded that it had never appeared in a meeting for the purpose of issuing an arbitration award and specifically refused to do so, that the architect was not accepted by the defendant, that this information was communicated to the architect, and that, although a meeting was held for the purpose of obtaining information from the plaintiff, the defendant does not accept the letters of April 10 and August 13, 1974, as an award. Defendant also pleaded that the plaintiff failed to produce any evidence during the hearings before the architect, although the architect through his recollection tried to help plaintiff clarify its position.

Both parties filed motions for summary judgment pursuant to Rule 56, Fed.R.Civ.P., both claiming that there is no dispute as to any material fact and that they are entitled to judgment as a matter of law. The motions were based upon the pleadings, plaintiff's request for admissions and defendant's response thereto, and the deposition taken of the architect. An affidavit was also filed by Juan N. Torruella to the effect that he was attorney in fact of the defendant bonding company and that at no time was he aware that Mr. de la Uz was acting as mediator or arbitrator or that the company was submitting itself to arbitration. Both motions for summary judgment were denied. The court apparently determined that as a minimum requirement the person who acts as arbitrator must be aware of the fact that he is acting as such in order to grant the parties before him the rights and opportunities

provided for in the Puerto Rico Arbitration Act. The court found:

> In the present case we have the peculiar situation of a person purportedly acting as arbiter who in a deposition taken, stated under oath that he was not aware that he had been presiding the meetings in which the arbitration hearings were supposed to be taking place.

On the basis of such finding, the court proceeded to determine:

> We find that in the present case the arbiter has committed an error which could have impaired the rights of the parties and, as such, there is sufficient cause under Title 32, Laws of Puerto Rico Annotated, Section 3222(c) to remand this case so that a new hearing be held in accordance with the provisions of the contract between the parties. Any provision in said contract as to the terms in which the parties may apply for arbitration, and any other subsequent terms as to the arbitration procedure shall be considered applicable and the first such date shall begin from the date of the court order.
>
> Wherefore, plaintiff's motion for summary judgment is hereby denied, as is defendant's motion for summary judgment. This case shall be dismissed until the arbitration award is rendered. Once the arbitration award is rendered the parties may resort to this Court for any further remedies they may deem necessary.

Plaintiff as a basis for reversal urges:

(1) The court misconstrued the deposition of the architect when it held that he was unaware of his position as arbitrator.

(2) The architect's decision contained in his letters of April 10 and August 13, 1974, was rendered pursuant to the contract between the parties and is final and binding.

(3) No basis exists under the laws of Puerto Rico for vacating the architect's award under the facts of this case.

We reverse the trial court's judgment and remand with direction to sustain plaintiff's motion for summary judgment for the reasons hereinafter set out.

The issues above stated are closely related and will be considered together. The trial judge determined that the arbitration law of Puerto Rico applies and stated such law to be as follows:

"Section 1 of the Arbitration Law of Puerto Rico (32 L.P.R.A. 3201), provides:

> 'Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any dispute which may be the object of an existing action between them at the time they agree to the arbitration; or they may include in a written agreement a provision for the settlement by arbitration of any dispute which may in future arise between them from such settlement or in connection therewith. Such an agreement shall be valid, requirable and irrevocable except for the grounds prescribed by law for the reversal of an agreement.'

"Section 22 (32 L.P.R.A. 3222) of the above mentioned Act, provides:

> 'In any of the following cases the court may, on petition of any of the parties and upon notice and hearing, issue an order reversing the award:
>
> • • • • • •
>
> '(c) When the referees are in error in refusing to postpone the hearing after just cause therefor was

shown, or in refusing to hear relevant and material evidence in the dispute, *or when they commit any other error impairing the rights of any of the parties.*'"

We assume that the following statement by the district court correctly states the governing law.

"In the Puerto Rican jurisdiction it has been consistently held that the reversal and modification or correction of an arbitration award may only be decreed when the grounds provided in the statute, part of which we have just quoted, are present. *P. R. Housing Authority* v. *Superior Ct., Zequeira, Int.,* 82 P.R.R. 333 (1961). It has also been held that judicial review of the merits of the arbitration award is not authorized. *Id.* In this regard, the Puerto Rican laws accord the courts the same role that they have under the Federal Arbitration Act, Title 9, United States Code, Section 1, et seq. See *Shahmoon Industries, Inc.* v. *United Steelworkers of America, AFL-CIO,* 263 F.Supp. 10 (DCNJ 1966). See, also, *Saxis S. S. Co.* v. *Multifacs Intern. Traders, Inc.,* 375 F.2d 577 (CA NY 1967); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805 (CA NY 1960), cert. den. 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727; *Local 719, American Bakery and Confectionery Workers of America, AFL-CIO* v. *National Biscuit Co.,* 252 F.Supp. 768, aff'd 378 F.2d 918."

We disagree, however, with the court's determination that Mr. de la Uz was not aware of the fact that he was acting as arbitrator. We have carefully examined the record as a whole, including the architect's deposition and his written decision, and are convinced that the architect understood the duties imposed upon him by the contract and that he performed the duties in a proper manner. The

trial court's determination that the architect was not aware of the fact that he was acting as an arbitrator lacks legal support under the undisputed facts as hereinabove stated.

Defendant's contention that the architect's determination is void on the ground it did not agree to his so acting lacks merit. Defendant is bound by the contractual provisions which unambigously provide that the architect shall make the determination on the issue involved. Defendant's contention that it had no proper notice of the hearing, in light of the undisputed facts, also lacks merit. As hereinabove set out, the architect's deposition discloses defendant's representation at the proceedings and further discloses that a full opportunity was afforded defendant to present any desired evidence or contention. The architect at no time refused to consider or receive any evidence which the defendant might offer. The architect's statement in the deposition, *supra,* that he gave everyone a chance to refute plaintiff's claim and to do whatever had to be done has not been denied by affidavit or otherwise in the record. The architect as the drawer of the plans and specifications and as the inspector of the progress of the building had considerable personal knowledge with respect to the claims in controversy which he was entitled to use in making his determination. As heretofore noted, defendant had been given an itemized statement of plaintiff's claim.

More significantly, a separate and independent ground for a reversal exists. Part 7.10 of the contract, *supra,* expressly provides that a party dissatisfied with the architect's award may invoke additional arbitration proceedings in accordance with the rules of the American Arbitration Association upon the filing of a timely demand for such arbitration with the other party to the contract. Paragraphs 7.10.2 and 2.2.11, both set out *supra,* unambiguously provide a means by which such additional arbitration can be accomplished.

Defendant thus had a right to obtain a full new arbitration of the claim by filing appropriate notice within thirty days of the architect's final decision. No such notice was ever served. By the express terms of the contract, the architect's decision became final upon defendant's failure to file the required notice within thirty days of the architect's decision.

The judgment is reversed. This case is remanded to the district court with direction to enter summary judgment for the plaintiff upon the architect's award.

APPENDIX B

Opinion and Order of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 74-1334

SUE KLAU ENTERPRISES, INC.,
Plaintiff

vs.

AMERICAN FIDELITY FIRE INSURANCE COMPANY,
Defendant.

OPINION AND ORDER

The complaint filed in the instant case invokes the jurisdiction of this Court under Title 28, United States Code, Section 1332 due to the diversity of citizenship between the parties and the matter in controversy exceeding the sum of $10,000.00, exclusive of interests and costs.

Plaintiff corporation, Sue Klau Enterprises, Inc., avers that it entered into a construction contract (the Contract) with Edil Construction, Inc., which obtained a labor and material payment bond, as well as a payment bond, as principal, issued by defendant herein American Fidelity Fire Insurance Company, as surety.

It is an admitted fact that Edil Construction, Inc., the principal in the above mentioned bonds, defaulted. That therafter plaintiff elected to complete the project pursuant to Paragraph 7.6.1 of the Contract and that by a letter dated April 4, 1973, plaintiff notified defendant surety company of its action.

By a letter dated July 25, 1973 to an agent for defendant herein, plaintiff demanded payment under the above mentioned bonds for the costs and expenses it incurred in finishing the construction of the building at Taft Street, Number 6 in Santurce, Puerto Rico. Defendant has admittedly refused to make the payment as demanded.

In a letter dated December 11, 1973 to Architect de la Uz, plaintiff requested a determination by the Architect that the amounts spent by plaintiff itemized in its July 25, 1973 letter were *bona fide* expenses spent by plaintiff in the completion of the apartment building pursuant to the above mentioned Construction Agreement and that defendant was responsible for the payment of such amounts under its Labor and Material Bond and the Performance Bond covering the construction project. Plaintiff alleges that the Architect served notice on plaintiff and defendant of a meeting to be held to resolve the controversy. Number 14 of plaintiff's First Request for Admissions, read:

> "You are hereby requested to admit . . . the following facts:
>
> . . .
>
> (14) That defendant was notified by letter dated February 13, 1974 addressed to Mr. Juan V. Torruella. President of Inter-Continental Insurance Agencies, Inc. that the Architect would hold a hearing to consider the arbitration demand filed by Plaintiff."

To this defendant gave the following answer:

> "14. No. We were invited to a meeting on February 22, 1974."

Architect de la Uz issued a letter dated April 10, 1974, which was subsequently clarified by letter dated August 13, 1974. Plaintiff avers that these letters constitute an arbitration award rendered by the Architect while defendant herein deny that they are such an award. To conclude

such denial defendant avers that they were not aware that Mr. Carlos de la Uz was acting as a mediator or arbiter in several disputed facts, nor that the company was submitting itself to arbitration proceedings. A sworn statement to these effects was signed by Mr. Juan N. Torruella as Attorney-in-Fact of American Fidelity Insurance Company, defendant herein.

Defendant has also alleged that the bonds issued by it are void because plaintiff violated the terms of the same.

By way of a counter claim defendant seeks to recover from plaintiff $40,000.00. Defendant alleges that said amount had to be paid by it in view of Edil Construction Co.'s inability to pay certain materials and that such disbursements were made in consideration of the fact that Architect de la Uz had certified the project as 98% completed, and that a retention of $39,268.34 remained deposited at the bank. Defendant goes on to state that plaintiff entered into a contractual relationship with another contractor without consulting defendant and performed additional work not contemplated in the contract and to spend the retained monies, which said party claims should have been used for the payment of the materials paid by defendant. Plaintiff in turn denied the allegations of the counterclaim asserting that the same has been fully adjudicated and is now merged in the arbitration award for which reason that claim is barred as *res judicata.*

Both parties have filed motions for summary judgment with their memoranda and affidavits, to which we now address ourselves. The threshold question to be decided in the present case is whether the Architect's letters of April 10 and August 13, 1974, should be considered as an arbitration award with the ensuing legal consequences.

Plaintiff invokes Title 9, United States Code, Section 9, for the proposition that this Court should confirm the arbitration award had in this case. We find said statute to be inapposite in the present instance. The Federal arbitration

statute codified in Title 9 of the United States Code, provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."
> [Title 9, United States Code, Section 2]

In Section 1, to Title 9 of the United States Code, the term "commerce" is defined as follows:

> ". . . 'commerce', as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, . . ."

The contract from which the alleged provision to arbitrate is here in question is a construction contract between plaintiff Sue Klau Enterprises, Inc., and Edil Construction, Inc. evidencing no "commerce" as statutorily defined. It has been held that in order to find jurisdiction under the Act the contract in which the arbitration clause is included must be one evidencing a maritime transaction or one involving commerce within the meaning of the statute. *Metro Industries Painting Corp.* v. *Terminal Const. Co.*, 287 F. 2d 382 (C.A. 2), cert. den. 82 S. Ct. 31, 368 U.S. 817.

This case not involving "commerce" within the meaning of the statute, jurisdiction lies because of the diversity of citizenship of the parties and the jurisdictional amount of $10,000.00. Title 28, United States Code, Section 1332. As such, the law to be applied in this case is the law of the state. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64 (1938), 58 S. Ct. 817, and cases following. See also *Sears Roebuck & Co.* v. *Herbert H. Johnson,* 325 F. Supp. 1338 (1971), in which the Arbitration Law of Puerto Rico was applied in a situation similar to the present one, involving a construction contract.

Section 1 of the Arbitration Law of Puerto Rico (32 L.P.R.A. 3201), provides:

> "Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any dispute which may be the object of an existing action between them at the time they agree to the arbitration; or they may include in a written agreement a provision for the settlement by arbitration of any dispute which may in future arise between them from such settlement or in connection therewith. Such an agreement shall be valid, requirable and irrevocable except for the grounds prescribed by law for the reversal of an agreement."

Section 22 (32 L.P.R.A. 3222) of the above mentioned Act, provides:

> "In any of the following cases the court may, on petition of any of the parties and upon notice and hearing, issue an order reversing the award:
>
> (a) When it was obtained through corruption, fraud or other improper means.
>
> (b) When there was evident bias or corruption on the part of the referees or any of them.

(c) When the referees are in error in refusing to postpone the hearing after just cause therefore was shown, or in refusing to hear relevant and material evidence in the dispute, *or when they commit any other error impairing the rights of any of the parties.*

(d) When the referees go beyond their function or when the award made does not finally and definitely decide the dispute submitted.

(e) If there was no submission or valid arbitration agreement and the proceedings were initiated without having served the notice of the intent to arbitrate, as provided in section 3211 of this title, or the motion to compel arbitration, as provided in subdivision 1 of section 3204 of this title.

In case an award is reversed, the court may, in its discretion, order a new hearing, before the same referee or before new referees to be selected in the manner provided for in the agreement for the selection of original referees, and any provision limiting the term within which the referees may arrive at a decision, shall be considered applicable to the new arbitration and to begin from the date of the court order." (emphasis added)

In the Puerto Rican jurisdiction it has been consistently held that the reversal and modification or correction of an arbitration award may only be decreed when the grounds provided in the statute, part of which we have just quoted, are present. *P. R. Housing Authority* v. *Superior Ct., Zequeira, Int.*, 82 P.R.R. 333 (1961). It has also been held that judicial review of the merits of the arbitration award is not authorized. *Id.*, supra. In this regard, the Puerto Rican laws accord the courts the same role that they have under the Federal Arbitration Act, Title 9, United States Code, Section 1, et seq. See *Shahmoon*

Industries, Inc. v. *United Steelworkers of America, AFL-CIO*, 263 F. Supp. 10 (DC NJ 1966). See, also, *Saxis S.S. Co.* v. *Multifacts Intern. Traders, Inc.*, 375 F. 2d 577 (CA NY 1967); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805 (CA NY 1960), cert. den. 80 S. Ct. 1612, 363 U.S. 843; *Local 719, American Bakery and Confectionery Workers of America, AFL-CIO* v. *National Biscuit Co.*, 252 F.Supp. 768, aff'd 378 F. 2d 918.

In the present case we have the peculiar situation of a person purportedly acting as arbiter who in a deposition taken, stated under oath that he was not aware that he had been presiding the meetings in which the arbitration hearings were supposed to be taking place.

Upon questions posed at the deposition, Mr. de la Uz gave the following answers:

"Q. My question is what happened in those meetings?

A. We got together on the problems that we or rather the owner and the insurance company had in relation with this project of 60 Taft Condominium and at these meetings we tried to find a solution to the situation created by the abandoning of the work by the contractor . . ." (Page 14, Deposition of Mr. Carlos de la Uz Arenal).

. . .

Q. Was evidence submitted to you in those meetings and were you aware of why you were there at those meetings?

A. Yes, I was aware of why I was there at those meetings, because I was the architect who designed the building and the architect who inspected the construction and I could give light on many factors like timing, interpretation of the construction contract, as agreed in the original construction contract, and the documents that were part of it.

Q. *Therefore, the reason you, the reason for your participation in the meeting was to give information of what had transpired and to furnish details, is that correct?*

A. *That's what I understand.*

Q. In those meetings did you examine all kinds of evidence or documents there such as invoices or 'nominas', payrolls or anything like that?

A. Not that I remember, not in those meetings.

Q. Who presided over those meetings?

A. *I don't think anybody presided.*" (emphasis added)

Deponent went on to state:

"Q. Was the insurance company present at the meetings where you acted as an arbiter?

A. They were represented, as I said before, by Mr. Torruellas and yourself in several of the meetings. *Again, I want to clarify again that I can't remember whether the meetings in which I was acting as an arbiter, you were present or not, I remember I started to go to these meetings as the architect who designed the building and inspected the construction.* Then after the meetings started to take place, I received a letter from the lawyers of Sue Klau Enterprises calling me as an arbiter and wanting my opinion, which I gave in writing, *then I don't remember and I cannot place exactly whether the meetings in which the insurance company was represented were held before and/or after my receipt of this letter, and my position as arbiter.*

Q. *Therefore, Mr. de la Uz, you mentioned that you had not presided at any meeting?*

A. *No, not that I was aware of.*

Q. *As an arbitration officer or arbitrating* officer.

A. I cannot definitely say that if I consider what was

done there legal or proper or improper in relation to proceedings, because I don't know the proceedings, what I know is that I was called in a letter, certified letter I think, by the lawyers of the owner, requesting my acting as mediator or arbitrator or something like that, which I accepted immediately and *I gave my opinion as a professional.*"

(Pages 30, 32 of the Deposition, emphasis added).

A long time ago the Supreme Court of the United States declared that arbitrators may be defined as private, extraordinary judges chosen by parties by whose agreement they are invested with quasi-judicial power to decide, finally and without appeal, matters in dispute between the parties. *Gordon* v. *United States,* F. Wall 188, 19 L.Ed. 35. It would seem that to be an adequate arbiter under the statute as a minimum requirement the person who is deemed to be an arbiter must be aware that he is acting as such in order to grant the parties before him the rights and opportunities provided for in the Puerto Rico Arbitration Act.

We find that in the present case the arbiter has committed an error which could have impaired the rights of the parties and, as such, there is sufficient cause under Title 32, Laws of Puerto Rico Annotated, Section 3222(c) to remand this case so that a new hearing be held in accordance with the provisions of the contract between the parties. Any provision in said contract as to the terms in which the parties may apply for arbitration, and any other subsequent terms as to the arbitration procedure shall be considered applicable and the first such date shall begin from the date of the court order.

Wherefore, plaintiff's motion for summary judgment is hereby denied, as is defendant's motion for summary judgment. This case shall be dismissed until the arbitration

Appendix B.

award is rendered. Once the arbitration award is rendered the parties may resort to this Court for any further remedies they may deem necessary.

The Clerk of the Court is ordered to enter judgment accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, January 27, 1976.

JOSE V. TOLEDO
Chief U.S. District Judge

Judgment of the District Court.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF PUERTO RICO

Civil No. 74-1334

SUE KLAU ENTERPRISES, INC.,

Plaintiff

v.

AMERICAN FIDELITY FIRE INSURANCE COMPANY,

Defendant

JUDGMENT

The Court having entered through Hon. José V. Toledo an Opinion and Order dismissing this case until the arbitration award is rendered

it is ORDERED AND ADJUDGED that this case be dismissed until the arbitartion award is rendered. Once the arbitration award is rendered the parties may resort to this Court for any further remedies they may deem necessary.

SO ORDERED.

San Juan, Puerto Rico, this 29th day of January 1976.

DENNIS A. SIMONPIETRI
Clerk
U.S. District Court

/s/ RAMÓN A. ALFARO
By: Ramón A. Alfaro
Chief Deputy Clerk

APPENDIX C

Statutes Involved

TITLE 28 UNITED STATES CODE

§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.
As amended Oct. 31, 1951, c.655, § 48, 65 Stat. 726; July 7, 1958, Pub. L 85-508, § 12(e), 72 Stat. 348.

§ 1292. *Interlocutory decisions*

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.
As amended Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(3), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 54 . . . (b) *Judgment Upon Multiple Claims or Involving Multiple Parties.*

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the

claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-9

AMERICAN FIDELITY FIRE INSURANCE COMPANY,
PETITIONER,

v.

SUE KLAU ENTERPRISES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the First Circuit entered on April 6, 1977 is reported at 551 F.2d 882 (1st Cir. 1977) and is reprinted as Appendix A to the Pe-

tition for a Writ of Certiorari. Petitioner's Motion for a Rehearing was denied by Order of the Court of Appeals entered on July 8, 1977. *See* Appendix A herein. The Judgment of the United States District Court for the District of Puerto Rico reviewed below was entered on January 29, 1976 based on the District Court's Opinion and Order dated January 27, 1976, No. 74-1334. Although the District Court's Opinion is not reported, it is reprinted as Appendix B to the Petition for a Writ of Certiorari.

Jurisdiction

Respondent does not question the jurisdiction as set forth in the petition.

Question Presented

Whether the Court of Appeals was correct in exercising its appellate jurisdiction to entertain an appeal from a judgment of the District Court vacating an arbitration award and dismissing an action brought to confirm said award without retaining jurisdiction over the controversy.

Statutes Involved

The pertinent provisions of Sections 1291 and 1292 of Title 28 of the United States Code and Rule 54(b) of the Federal Rules of Civil Procedure are set forth in the Petition as Appendix C.

Statement of the Case

The Respondent, Sue Klau Enterprises, Inc., hereinafter referred to as "Sue Klau", filed an action with the District Court for the District of Puerto Rico for the confirmation

of an arbitration award rendered pursuant to the provisions of an arbitration clause contained in a written contract which the Petitioner incorporated by reference in the bonds it issued in favor of Sue Klau. The Petitioner, American Fidelity Fire Insurance Company, hereinafter also referred to as "the Bonding Company", filed an answer to the Complaint denying, in essence, the validity of the arbitration award and counterclaimed for the recovery of certain monies allegedly disbursed by the Bonding Company pursuant to its contractor's bonds issued in favor of Sue Klau. Sue Klau denied the allegations of the counterclaim and asserted, *inter alia,* that the Bonding Company's counterclaim was fully adjudicated and is now merged in the arbitration award. Sue Klau filed a Motion for Summary Judgment supported by the affidavit of its Vice-President, a transcript of the deposition taken of the Arbitrator and the Bonding Company's answers to a Request for Admissions, requesting the confirmation of the arbitration award rendered in this case and dismissing the Bonding Company's counterclaim. The Bonding Company filed a motion entitled "Motion for Summary Judgment" which, in essence, disputed the validity of the arbitration award.

By Opinion and Order filed and entered on January 28, 1976, the District Court denied Sue Klau's Motion for Summary Judgment and ordered the Clerk of the Court to enter judgment dismissing the case and vacating the arbitration award herein. (*See* Appendix B to the Petition for a Writ of Certiorari.) On January 29, 1976, the Clerk of the Court entered judgment dismissing the case. (*See* Appendix C to the Petition for a Writ of Certiorari.)

Sue Klau appealed the District Court's Judgment to the Court of Appeals for the First Circuit. After carefully reviewing the entire record including the Architect's written decision and deposition, the First Circuit found

that Bonding Company's contentions were devoid of merit. Moreover, the Court found that Bonding Company's failure to take timely advantage of its right under the contract to obtain a "full and new arbitration" within thirty days of the Architect's final decision constituted a "separate and independent" basis for overruling the District Court's decision. On these two grounds for reversal, the First Circuit vacated the District Court's judgment and remanded the case to the lower court with direction to enter summary judgment for Sue Klau in confirmation of the arbitration award.

Argument

I. THE JUDGMENT OF THE DISTRICT COURT DISMISSING THIS ACTION BROUGHT TO CONFIRM AN ARBITRATION AWARD WITHOUT RETAINING JURISDICTION OVER THE CASE IS A FINAL JUDGMENT SUBJECT TO APPEAL BEFORE THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

A. *The Court of Appeals for the First Circuit did not deviate from the accepted usual course of proceedings so as to require the exercise of this Court's power of supervision.*

A judgment or order of the district court dismissing an action brought to confirm an arbitration award is a final decision subject to review on appeal before the court of appeals. *Rogers* v. *Schering Corp.*, 262 F.2d 180, 182 (3d Cir. 1959) *cert. denied*, 359 U.S. 991, *Thornton v. Carson*, 11 U.S. 596 (7 Cranch) (1813). The Court of Appeals for the First Circuit, in its Order entered July 8, 1977 denying Petitioner's untimely motion for rehearing where it asserted for the first time in this proceedings the alleged lack of finality of the District Court's judgment and the consequent want of appellate jurisdiction in this case, stated:

> "We note, however, that we have no doubts as to the existence of appellate jurisdiction in this case. *Compare Rogers* v. *Shering Corp.* [sic] 262 F.2d 180, 182 (3d Cir., 1959)" (Appendix "A", *infra*)

As suggested by the Court of Appeals' order of July 8, 1977, *Rogers* v. *Schering Corp., supra*, is directly applicable herein. In *Schering*, the District Court entered an order denying a motion to confirm an arbitration award and granted an opposing motion to vacate upon the finding that one of the arbitrators was disqualified to act. On appeal, the appellate jurisdiction of the Court of Appeals for the Third Circuit was called in question by the appellee alleging that the District Court order was not final. Rejecting mistaken analogies to remands for rehearing and cases requiring further judicial intervention subsequent to an order compelling arbitration, the Court held that the order refusing to confirm the arbitration award was final and appealable relying on the established doctrine that judicial orders entered as the result of arbitration proceedings are final when they are not "merely a step in the judicial enforcement of a claim nor auxiliary to a main proceeding but is the full relief sought". *Rogers* v. *Schering, supra*, 268 F.2d at 182. *See Gavlik Construction Co.* v. *H.F. Campbell Co.* v. *Wickels Corp.*, 526 F.2d 777, 782 (3d Cir. 1975); *cf. Goodall-Sanford* v. *United Textiles Workers of America*, 353 U.S. 550, 551 (1957).

In the instant case, the only relief sought by Sue Klau before the District Court was the confirmation of the arbitration award rendered herein. An action to confirm an arbitration award is not a step in the judicial enforcement of a claim nor is it auxiliary to any other judicial proceeding. Puerto Rico Arbitration Act, 32 L.P.R.A. 3221; Compare: Federal Arbitration Act, 9 U.S.C. 9; *See Rogers* v. *Schering, supra, cf. Goodall-Sanford* v. *United*

Textiles Workers of America, supra. Therefore, the judgment of the District Court herein had the requisite finality necessary for appellate jurisdiction.

B. *The Court of Appeal's action in exercising its appellate jurisdiction in this case is consonant with settled doctrine and is not in conflict with the authorities cited by the Petitioner.*

In an apparent effort to raise the specter of a conflict between the decision below and that of the Court of Appeals for the Second Circuit in *Clark* v. *Kraftco Corp.*, 447 F.2d 933 (2d Cir. 1971), Petitioner subjects the judgment of the District Court, and the Opinion and Order on which it is based, to a tortured interpretation completely at odds with the ordinary meaning of the language employed. Thus, Petitioner at page 5 of its Petition, interprets the phrase in the District Court's judgment, "this case shall be dismissed . . ." as "really mean(ing)" that the judicial proceedings "were suspended" with the result that in Petitioner's view the action was then "pending (no longer 'dismissed')" and that, furthermore, the District Court "preserve(d) jurisdiction" over the matter. Obviously, such an interpretation is contrary to the explicit language in the District Court's judgment and the Opinion and Order on which it is based and in truth is only a reflection of what the Petitioner would want the words to mean.[1]

Petitioner's reliance on *Clark* v. *Kraftco Corp., supra,* is misplaced. In *Kraftco,* the Second Circuit held that an

[1] " 'There's glory for you!' 'I don't know what you mean by "glory",' Alice said. 'I meant, "there's a nice knock-down argument for you!" ' 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean,—neither more nor less.' " Carroll, Lewis (Charles Lutwidge Dodgson), *Through the Looking Glass,* Chapter 6.

order setting aside a consultant's findings and remanding the matter to him for specific findings was not an appealable order where the order was issued in the course of a continuing litigation and where the District Court expressly retained jurisdiction over the action for further determination on the merits. *Clark* v. *Kraftco Corp., supra,* 447 F.2d at 935. Because of fundamental differences between *Kraftco* and the instant case, the decision of the Second Circuit is totally inapposite. In *Kraftco,* the Court relied on the fact that the order was issued in the course of a continuing litigation where the District Court retained jurisdiction to distinguish that case from *Rogers* v. *Schering Corp., supra,* and other cases holding that judgment entered in an independent proceeding is final and appealable. *See also*: *Farr & Co.* v. *Cia. Intercontinental de Navegacion,* 243 F.2d 342, 345 (2d Cir. 1957). In the instant case, the judgment of the District Court was entered in an independent proceeding to confirm an arbitration award and not in a continuing litigation. Furthermore, the District Court in its judgment did not retain jurisdiction over the action. An order vacating an arbitration award is interlocutory only where the Court has expressly retained jurisdiction over specific questions and where the arbitration is but one step in a continuing action. *School Dist.* v. *Lundgren,* 259 F.2d, 101, 105 (9th Cir. 1958). Thus, the decision in *Kraftco* is inapplicable to this case and the judgment of the District Court is final and appealable. *Rogers* v. *Schering Corp., supra.*

Even if the District Court's invitation to the parties to rearbitrate their controversy is to be construed as an order directing arbitration, this fact alone does not destroy its finality and appealability. *Rogers* v. *Schering, supra, Goodall-Sanford* v. *United Textile Workers, supra.* As in *Schering,* the District Court's judgment in the instant case did not require or anticipate the necessity of another judicial

order to implement the arbitration award. The District Court's language stating "[o]nce the arbitration award is rendered, the parties may resort to this court for any further remedies they may deem necessary", was merely formalistic and superfluous. This is not the type of judicial intervention which would dissipate the finality of the orders as contemplated by the Third Circuit in *Schering*. *See Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons,* 62 F.2d 1004, 1005 (2d Cir. 1933). Because as in *Schering,* judicial intervention required to enforce the Court's orders to vacate and arbitrate is *de minimis,* the orders are final and appealable. *Cf. Krauss, supra,* 1005.

II. No Counterclaim Exists That Would Bar Appealability Under Rule 54(b)

A. *The District Court's disposition of the case dismissed the entire action and was therefore final.*

An order dismissing the entire action is clearly final and appealable. 9 *Moore's Federal Practice* Paragraph 110.13 (1), at 152 (2d Ed. 1975). The Ninth Circuit has drawn a clear line between orders which dismiss the case and those which dismiss a complaint. *Firchau* v. *Diamond National Corporation,* 345 F.2d 269, 270-71 (9th Cir. 1965). Those orders dismissing but one of several complaints in a multi-claims action are clearly interlocutory and nonappealable absent a Rule 54(b) certificate.

The language of District Court's judgment leaves no doubt that the entire action was dismissed. Although the word "case" rather than "action" was used, the two words are synonymous. *See Black's Law Dictionary,* 271 (4th Ed. 1951). Moreover, both parties had motioned for summary judgment on the entire case and the District Court denied both motions. In denying these motions and

thereafter ruling "This case shall be dismissed", the District Court gave no indication that Petitioner's counterclaim was not embraced by the dismissal.

B. *Even if the District Court's Judgment had not Embraced Petitioner's illusory counterclaim, the counterclaim was rendered res judicata by the Architect's award, and it is nonsensical to deny an appeal on the basis of a court's failure to consider a res judicata claim.*

1. *The Counterclaim was res judicata.*

Courts have held that an arbitration award precludes an action on any matter submitted or which could have been submitted to the arbitrator for decision. *Behrens* v. *Skelly,* 173 F.2d 715 (3rd Cir. 1949), *cert. denied,* 338 U.S. 821; *Goldstein* v. *Doft,* 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd* 353 F.2d 484, *cert. denied,* 383 U.S. 960; *Ritchie* v. *Landau,* 475 F.2d 151 (2d Cir. 1973). In *Goldstein* v. *Doft,* the Plaintiff's claim for commissions allegedly owed on sales in his territories was denied by arbitrators. Subsequently, Plaintiff instituted an action against Defendants for inducement of a breach of contract, and misrepresentation on the part of Defendant, which, in effect, deprived him of the commissions he had sought in the prior arbitration. The court entered judgment against Plaintiff holding that the prior arbitration award barred his claim as *res judicata* and went on to explain its reasoning as follows:

> Before Plaintiff can succeed on either of the latter claims (inducement of a breach of contract and unjust enrichment), he would have to establish as an essential element a breach of the agreement under which he was to receive his commissions. Since the award went against him on that issue, he may not now relitigate it.

> Since those claims are directly related to the contract and within its broad arbitration provision, they might have been brought before the arbitrators, and also are barred 236 F. Supp. at 732, 733 (citations omitted).

The Court went on to hold that a shift in the legal theories under which Plaintiff sought relief did not alter its conclusion. *See also Goldstein* v. *Doft,* 353 F.2d 484 (2d Cir. 1965); *Behrens* v *Skelly, supra,* at 719.[2]

The doctrine of *res judicata* as stated above is directly applicable herein. There is no question that the parties here are identical to the parties before the Architect. Furthermore, the Bonding Company's purported counterclaim was directly adjudicated by the Architect's decision since the Architect made an express determination regarding the percentage of the work realized which was contemplated in the original construction agreement. Furthermore, assuming for the purpose of argumentation that the Bonding Company's claim was not presented to the Architect, it is barred by the doctrine of *res judicata* since the claims might have been brought before the Architect. *Goldstein* v. *Doft, supra.* It is also obvious that the Architect's award necessarily concludes that the Bonds issued by Defendant were valid and Plaintiff was owed by Defendant pursuant to the Bonds the amount stated in the Architect's letters.

The Bonding Company's counterclaim was fully adjudicated and decided by the Architect's decision and further-

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[2] The doctrine of *res judicata* set forth at Article 1204 of the Civil Code of Puerto Rico, 31 L.P.R.A. 3343 has been interpreted by the Courts of Puerto Rico to bar subsequent actions between the same parties for the same cause of action and things, not only regarding questions actually litigated and adjudicated, but also questions that could have been properly litigated and adjudicated in the former action. *Capo Sanchez* v. *Secretary of the Treasury,* 92 P.R.R. 817, 819 (1965) *In re de Manati,* 357 F. Supp. 1253 (D.P.R., 1972).

more, the Bonding Company had full opportunity to litigate its claim before the Architect. In this regard, the words of the Court in *Ritchie* v. *Landau* are particularly appropriate:

> "The critical fact in both cases is that the Plaintiffs (here the Bonding Company) were given one opportunity to litigate their claims for compensation before the arbitrators; and one opportunity is all they are entitled to have." 475 F.2d at 156.

2. *Denial of the Appeal would have made little sense in terms of judicial economy and fairness.*

A determination by the Court of Appeals to deny appealability because the District Court had not expressly considered a *res judicata* counterclaim would have been nonsensical and anathemas to principles of judicial economy. In making such a determination, the Court would have held form above substance at the price of duplicative and more costly litigation borne by both parties.

Parties seek arbitration for the purpose of avoiding the delay and costly expense of courtroom litigation. Therefore, any order that denies appealability of court decisions confirming or vacating an arbitration award is antithetical to that purpose. An erroneous determination by a District Court setting aside an award could portend substantial and additional delay and expense for parties ordered back into arbitration. Given the purpose underlying arbitration, additional delays and costs make little sense when they could possibly be avoided by immediate appeal. *See Stathatos* v. *Arnold Bernstein S.S. Corp.,* 202 F.2d 525, 529 (2d Cir. 1953) (Frank, J., dissenting).

Because the Bonding Company's counterclaim was *res judicata,* the Bonding Company's stand was not harmed

by the District Court's failure to rule expressly on its propriety. On the other hand, if the Court of Appeals had considered the District Court's alleged neglect to issue an express order on the counterclaim fatal to Sue Klau's appeal, it would have forced both parties to incur additional expense and to invest time in new arbitration proceedings. Such proceedings would have been subject to additional confirmation hearings as well as appellate review. To have subjected both the parties and the judicial system to undergo such additional strain and cost because a District Court may have failed to rule expressly on a counterclaim which was *res judicata* have defied notions of fairness and judicial economy.

III. Even Assuming Arguendo That the District Court's Dismissal of the Case Was Interlocutory and That the District Court Had Not Rendered Judgment on the Counterclaim, the Dismissal Would Still Be Appealable Under the *Gillespie* Doctrine.

In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), the Court recognized that the question of finality under 28 U.S.C. Sec. 1291 is "frequently so close . . . that it is impossible to derive a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality". 279 U.S. at 152. The Court noted that a decision need not be the last possible order in a case to be final, and that courts should give a "practical rather than a technical construction" to those marginal orders falling within the "twilight zone". In practically construing such orders, indicated the Court, courts must balance "the inconvenience and costs of piecemeal review on one hand and the danger of denying justice by delay on the other". 379 U.S. at 153.

Court of Appeals have used the "practical approach" suggested in *Gillespie* as a rationale to permit appeal of orders which might otherwise have been considered interlocutory. *See, e.g., Plymouth Mut. Life Ins. Co.* v. *Illinois Mid-Continent Life Ins. Co. of Chicago,* 378 F.2d 389 (3d Cir. 1967) (orders to select an impartial insurance adjuster and appointing said adjuster); *Fox* v. *City of West Palm Beach,* 383 F.2d 189 (5th Cir. 1967) (order denying mandatory injunction and relegating plaintiff to ordinary action for damages); *Staggers* v. *Otto Gerdau Co.,* 359 F.2d 292 (2d Cir. 1966) (orders to substitute parties pursuant to Fed. R. Civ. P. 25(a) and to amend complaint by adding new parties). The power of courts of appeal to deviate occasionally from technical definitions of finality is necessary for sensible and economical judicial administration. 9 *Moore's Federal Practice,* ¶110.12 at 151 (2d Ed. 1975); *cf. Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). The *Gillespie* Doctrine exists to assure that courts of appeals will be able to rule on orders which would have been appealable under 28 U.S.C. Sec. 1292(b) and which have been appealed in good faith. By invoking the doctrine, a court of appeals can avoid needless waste of time and money in judicial administration and repetitious litigation incurred when questionable orders are remanded without the opportunity for a more efficient appeal. *See Staggers* v. *Otto Gerday Co., Inc.,* 359 F.2d 292, 295 (2d Cir. 1966).

If the orders in the instant case are not final they clearly fall in the "twilight zone" of orders which are not easily defined as either final or interlocutory. The Judgment of the District Court in the instant case clearly falls within such a "zone". Said Judgment vacates the arbitration award rendered in this case. Furthermore, notwithstanding Petitioner's protestations to the contrary, the Judgment states that the action is "dismissed" and neither the Judg-

ment nor the Opinion and Order contained a reservation of jurisdiction by the District Court. In such circumstances, Petitioner would require Sue Klau to indulge in the type of interpretation of the District Court's Judgment which Petitioner exercises in its Petition and assume the risk of waiving its right to a judicial review of the District Court's judgment in a subsequent appeal had the parties undertaken new arbitration of their controversy. It requires little imagination to assume that the Petitioner herein in an appeal taken after subsequent arbitration would argue vehemently that the District Court's Judgment reviewed by the Court of Appeals in the instant case was final and not subject to review because Sue Klau had failed to take a timely appeal.

Considerations of judicial economy and fairness are relevant under the *Gillespie* doctrine to determine whether an appeal may lie from orders falling within the "twilight zone". In this case, such considerations far outweigh the possible damages wrought by piecemeal review. As found by the Court of Appeals in its opinion, the arbitration award rendered by the Architect in this case was rendered pursuant to the contract provisions agreed to by the parties (Appendix "A" to Petition for Writ of Certiorari, at A-8 – A-10). The Court of Appeal's opinion reveals that careful consideration was given to the arguments advanced by the Petitioner below in seeking to invalidate the arbitration award and these were found frivolous. Furthermore, the contract documents provided, and the Court of Appeals so found, that Petitioner was entitled to obtain a new and full arbitration of the controversy by filing a timely notice within thirty days of the Architect's award. All of Petitioner's contentions on the merits could be argued and decided anew in an arbitration conducted pursuant to the Rules of the American Arbitration Association had it so desired. However, after having been afforded a full and

complete opportunity to present all its arguments before the Architect and even in view of the fact that under the agreement between the parties Petitioner was entitled to a complete rearbitration of its claims, it chose to do nothing and thus waived its right to further arbitration. Petitioner now wants this Court to relieve it from the consequences of its failure to act in order to submit itself to a proceeding it disavowed below. Having had a full and complete opportunity before the Architect to present its arguments and contentions, Petitioner wishes a second opportunity to repeat the same exercise and thus further delay payment of Sue Klau's just claims which were set forth in detail and have been pending since its demand letter of July 25, 1973. A resubmission of this matter to arbitration would frustrate the very policies implicit in arbitration proceedings. These are the considerations which prompted this Court to fashion the *Gillespie* doctrine.

Conclusion

Because Petitioner has failed to establish any grounds for the granting of a Writ of Certiorari under Rule 19 of the Rules of this Court, the Court should deny issuance of the Writ.

Respectfully submitted,

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APPENDIX "A"

United States Court of Appeals
For the First Circuit

No. 76-1143.

SUE KLAU ENTERPRISES, INC.,
PLAINTIFF, APPELLANT,
v.
AMERICAN FIDELITY INSURANCE COMPANY,
DEFENDANT, APPELLEE.

ORDER OF COURT
ENTERED JULY 8, 1977

The motion for permission to file a petition for rehearing out of time is denied. The judgment of our court was entered April 6, 1977, not June 6, 1977. Petitioner has utterly failed to make the kind of showing of justifiable delay that would lead me to permit a petition to be filed more than two months after the entry of judgment. We note however that we have no doubts as to the existence of appellate jurisdiction in this case. *Compare Rogers* v. *Shering Corp.*, 262 F.2d 180, 182 (3d Cir. 1959).

By the Court:
DANA H. GALLUP, *Clerk.*
By (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Tulla and Gonzalez-Mangual.]

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-9

AMERICAN FIDELITY FIRE INSURANCE COMPANY,

Petitioner,

vs.

SUE KLAU ENTERPRISES, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court of the United States
OCTOBER TERM, 1977

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AMERICAN FIDELITY FIRE INSURANCE COMPANY,

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

I

The Decision of the District Court Was Not Final.

Respondent's brief in opposition to the petition for certiorari herein completely ignores the italicized words in the following crucial portions of the opinion and of the judgment of the District Court:

> "This case shall be dismissed *until the arbitration award is rendered.*" (Opinion, A19-A20).*
>
> "It is ORDERED AND ADJUDGED that this case be dismissed *until the arbitration award is rendered.*" (Judgment, A21).

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* All numerical references preceded by the letter "A" are to pages of the appendix to the petition herein.

Furthermore, respondent's brief (p. 8) sloughs off as "merely formalistic and surplusage" the statement, both in the opinion (A20) and in the judgment (A21), that "Once the arbitration award is rendered the parties may resort to this Court for any further remedies they may deem necessary."

It is a cardinal rule that statutes are to be construed, if at all possible, so as to give meaning and effect to every word and clause and not to treat any sentence, clause or word as superfluous. *Washington Market Company* v. *Hoffman,* 101 U.S. 112, 115-116 (1879); *Ex parte Public National Bank,* 278 U.S. 101, 105 (1928); *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932). The same rule applies to the construction of judgments. *Boundary County, Idaho* v. *Woldson,* 144 F.2d 17, 20 (CA9, 1944), cert. den. 324 U.S. 843 (1945); *Alegre* v. *Marine Motor Sales Corporation,* 228 F.2d 713, 715 (CA5, 1956); 49 C.J.S., Judgments, § 496, pp. 863-4.

Petitioner respectfully submits that respondent's arguments are thus premised on a faulty construction of the judgment of the District Court and are therefore unsound and that petitioner's construction (pet., p. 5) of the judgment is the proper one, consonant with the foregoing authorities.

Rogers v. *Schering Corporation,* 262 F.2d 180 (CA3, 1959), cert. den. *sub nom. Hexagon Laboratories, Inc.* v. *Rogers,* 359 U.S. 991 (1959), upon which respondent heavily relies (br., pp. 4, 5 and 7), is inapposite for a number of reasons:

(1) In the cited case, there was no reason to expect further litigation after the second arbitration award. Circuit Judge Maris said: "Certainly the award will not require judicial approval or a court decree to put it into effect" (262 F.2d at 182). This was because of a prior order compelling arbitration. In the instant case, there is

no such prior order and any new award by the architect would not be self-executing, but at a minimum an application for judgment on the new award would be required. Furthermore, Chief Judge Toledo in his opinion (A20) and the judgment (A21) expressly provide for further judicial proceedings after the second award. This contemplation of further proceedings was stated by Judge Maris as the touchstone of determining appealability of such orders: an order is not appealable if "in the normal course of judicial procedure" there will be a later order, but it is appealable if in such normal course it will not be followed by another adjudication, 262 F.2d at 182. Clearly, the instant order is in the former category.

(2) In the cited case, there was no unadjudicated pleading: the motion to confirm the award was denied and the motion to vacate was granted (262 F.2d at 181). In the instant case, the counterclaim is unadjudicated.

(3) In the cited case, the District Court refrained from directing a new arbitration, 262 F.2d at 181-182; in the instant case, Chief Judge Toledo said there was "sufficient cause . . . to remand this case so that a new hearing be held" (A19).

Accordingly, it is submitted that *Rogers* v. *Schering Corporation, supra,* does not support respondent's position.

II

The Existence of the Counterclaim Bars Appealability.

Respondent argues (br., pp. 9-11) that the architect's award constituted a complete defense of *res judicata* to petitioner's counterclaim and that, therefore, the existence of the counterclaim is no bar to the appealability of the District Court's decision. The *res judicata* defense goes to the merits of the counterclaim and has no bearing on appealability. More important is the fact that the District

Court vacated the award. A vacated or reversed judgment has no weight as *res judicata*. *De Nafo* v. *Finch*, 436 F.2d 737, 740 (CA3, 1971); *Simpson* v. *Motorist Mutual Insurance Company*, 494 F.2d 850, 854 (CA7, 1974), cert. den. *sub nom. Motorists Mutual Insurance Company* v. *Simpson*, 419 U.S. 901 (1974). No greater weight can be given to a vacated arbitration award. Appealability must be determined as of the time the appeal was taken and it is of no consequence, in determining appealability, that the award was subsequently reinstated by the Court of Appeals on an appeal of which it lacked jurisdiction.

Conclusion

The petition for certiorari should be granted, the judgment of the Court of Appeals should be vacated and remanded with instructions to dismiss respondent's appeal.

Respectfully submitted,

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